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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1995

GENERAL PUBLIC UTILITIES CORP.,
METROPOLITAN EDISON CO.,
JERSEY CENTRAL POWER & LIGHT CO.,
PENNSYLVANIA ELECTRIC CO.,
BABCOCK & WILCOX CO.,
MCDERMOTT INCORPORATED,
RAYTHEON CONSTRUCTORS INC.,
BURNS & ROE ENTERPRISES, INC.,
DRESSER INDUSTRIES, INC.,
Petitioners

v.

JONATHAN W. DODSON, et al.,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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A. H. WILCOX
Counsel of Record
ELLEN KITTREDGE SCOTT
PEPPER, HAMILTON & SCHEETZ
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 981-4000

Attorneys for Petitioners

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QUESTION PRESENTED

Where the federal regulatory agency with exclusive authority over the safety aspects of nuclear power permits public exposure to radioactive material at specified levels, should a plaintiff be permitted to proceed with a personal injury lawsuit absent proof that such plaintiff was exposed to radiation that exceeded those permissible levels?

PARTIES TO THE PROCEEDING

Petitioners are General Public Utilities Corp., Metropolitan Edison Co., Jersey Central Power & Light Co., Pennsylvania Electric Co., Babcock & Wilcox Co., McDermott Incorporated, Raytheon Constructors Inc., Burns & Roe Enterprises, Inc. and Dresser Industries, Inc. The information required by Supreme Court Rule 29.6 regarding each of the Petitioners is set forth in Petitioners' Appendix at 71a.

Respondents are the personal injury plaintiffs in this litigation and are identified in the Appendix at 73a.

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10 C.F.R. § 20.106 (1979) ..... passim

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Federal Radiation Council Staff Report, *Development of Radiation Protection Standards* (May 1960) 11

Federal Radiation Council Staff Report No. 2, *Background Material for the Development of Radiation Protection Standards* (Sept. 1961) 14

TABLE OF AUTHORITIES—*(Continued)*

Miscellaneous: Page(s)

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American Cancer Society, *Cancer Facts & Figures* (1995)..... 21

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Restatement (Second) of Torts § 286 (1965)..... 15, 16

Scranton, William W., III, Lt. Governor, et al., *Report of the Governor's Commission on Three Mile Island* (Feb. 1980) 6

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on October 17, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 67 F.3d 1103 (3d Cir. 1995) and appears in the Appendix at 1a. The opinion of the United States District Court for the Middle District of Pennsylvania is unreported and appears in the Appendix hereto at 32a.

STATEMENT OF JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Third Circuit were entered on October 17, 1995. App. at 1a, 31a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

REGULATORY PROVISIONS INVOLVED

The question presented involves the application, in a public liability action under the Price-Anderson Act, 42 U.S.C. § 2014(hh), of the federal permissible dose limits governing radiation exposures to members of the public in effect at the time of the Three Mile Island accident, 10 C.F.R. §§ 20.105 and 20.106, which are set forth in the Appendix at 68a.

STATEMENT OF THE CASE

This litigation arises out of the March 28, 1979 accident at Unit 2 of the Three Mile Island nuclear generating station located in Dauphin County, Pennsylvania ("TMI"). In the wake of that accident, over 2,000 plaintiffs have filed suits in which they claim to have suffered personal injuries caused by their exposure to radiation released during the accident. Because the plaintiffs seek compensation on account of the hazardous properties of special nuclear material, these are "public liability actions," 42 U.S.C. § 2014(hh), arising under the Price-Anderson Act (the "Act"), 42 U.S.C. § 2210.

In the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*, Congress had directed that the Atomic Energy Commission ("AEC") (later the Nuclear Regulatory Commission ("NRC")) establish safety regulations for the operation of federally licensed nuclear power facilities, resulting in a system of regulation so comprehensive that this Court held that the Federal Government thereby "has occupied the entire field of nuclear safety concerns." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n,* 461 U.S. 190, 212 (1983). Based on this regulatory system, defendants moved for summary judgment, showing that no plaintiff had been exposed to radioactive material in excess of the permissible dose limits established by the NRC.

Defendants contended before the district court that while the release of radiation from the site exceeded the permissible limits on *releases* established by one of the applicable regulations, no individual plaintiff was actually *exposed* to radiation in excess of those limits. The dose to the population surrounding TMI was investigated by several federal and state agencies,[1] all of which agreed that the environmental monitoring

1. Accident doses were investigated by the President's Commission, *see* John G. Kemeny, et al., *Report of the President's Commission on the Accident at Three Mile Island* (Oct. 1979), a special inquiry group of the Nuclear Regulatory Commission, *see* Nuclear Regulatory Commission Special Inquiry Group, Mitchell Rogovin, et al., *Three Mile Island: A Report to the Commissioners and to the Public* (Jan. 1980), a special task group of the Nuclear Regulatory Commission, the Environmental Protection Agency, and the Department of Health, Education and Welfare, *see* Ad Hoc Popu-

surrounding the site confirmed that the highest exposures in populated areas were below 100 millirems.[2]

In response to defendants' showing, plaintiffs made two claims. First, plaintiffs claimed that they were in fact exposed to concentrations in excess of the permissible limits. Second, plaintiffs claimed that, in any event, to maintain their causes of action they do not have to prove that any plaintiff was individually exposed in excess of the federal permissible dose limits; in their view, a plaintiff may proceed with a claim if he or she simply proves a release in excess of the regulatory limit, without proof of a resulting exposure to him or her in excess of the federal permissible dose limits. Plaintiffs' first claim presents an issue of fact which may have to be resolved by a trial. Plaintiffs' second claim presents an issue of law, specifically, the content of the duty of care owed to plaintiffs in a public liability action under the Price-Anderson Act, 42 U.S.C. § 2210.

The court of appeals held that "[b]ecause defendants conceded that they violated § 20.106, they violated their duty of care [owed plaintiffs]. . . ." *In re TMI*, 67 F.3d at 1118, App. at 27a. In the view of the court of appeals, plaintiffs are only required to show: 1) a release at the site boundary which exceeded the regulatory limits; 2) exposure to *some* radiation,

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NOTES *(Continued)*

lation Dose Assessment Group, *Population Dose and Health Impact of the Accident at the Three Mile Island Nuclear Station* (May 1979), and the Governor's Commission, *see* William W. Scranton, III, Lt. Governor, et al., *Report of the Governor's Commission on Three Mile Island* (Feb. 1980).

2. A millirem is a unit of measurement used to measure radiation dose. *See* 10 C.F.R. § 20.1004. The federal permissible dose limits applicable to workers on site, 10 C.F.R. §§ 20.101-20.104, permit exposures of 5,000 millirems (or 5 rems) per year. The federal permissible dose limits applicable to the general public, 10 C.F.R. §§ 20.105 and 20.106, permit exposures of 500 millirems per year. Thus, the maximum exposures to individuals in the general public caused by the accident, as determined by several federal and state investigations, were no more than one-fifth of the federal permissible dose limits for offsite exposures and one-fiftieth of the permissible exposures for nuclear workers.

"although not necessarily at the levels prohibited by" the regulations; 3) injuries; and 4) that their injuries were caused by their exposure to radiation. *Id.* at 1119, App. at 29a.[3]

3. The district court denied defendants' motion for summary judgment by order dated February 18, 1994, App. at 32a, and certified its ruling for interlocutory appeal to the United States Court of Appeals for the Third Circuit. App. at 62a. The court of appeals accepted the certification, App. at 67a, and exercising its jurisdiction pursuant to 28 U.S.C. § 1292(b), by decision of October 17, 1995, affirmed in part and reversed in part. *In re TMI*, 67 F.3d 1103 (3d Cir. 1995), App. at 1a. The question presented here relates only to that part of the court of appeals' decision affirming the order of the district court.

REASONS FOR GRANTING THE WRIT

The question presented by this Petition involves the relationship between a comprehensive system of federal law and the content of a duty in tort based on that federal law. At the time of the TMI accident, the NRC permitted releases of radiation from licensed facilities if resultant exposures did not exceed 500 millirems per year. 10 C.F.R. §§ 20.105 and 20.106 (1979), App. at 68a. These permissible dose limits were premised on the NRC's determination that it was not foreseeable that an individual exposed to radiation in an amount of 500 millirems per year or less would be injured: the permissible limits afforded "a very substantial margin of safety," 22 Fed. Reg. 548 (1957), and "any biological effects that might occur at these low levels . . . have such low probability of occurrence that they would escape detection by present day methods of observation and measurement." 40 Fed. Reg. 19,439-40 (1975).

Despite the clear and uncontroverted regulatory judgment that there is no risk of harm associated with the permissible dose limits, the court of appeals held that an NRC licensee violates the tort duty of care owed to a plaintiff if it releases a given amount of radiation at the site of the licensee's facility. Under this approach, it simply does not matter whether the plaintiff was exposed to more than the permissible levels of radiation. In its construction and application of the federal regulations as a standard of care in tort, without regard to their purpose or intent, the court of appeals has contradicted the federal determination that exposure to 500 millirems will not cause foreseeable harm. As a result, there will be little, if any, consistency between the regulation provided by the NRC and that imposed by tort litigation. There can be little doubt that the resulting ad hoc regulation of nuclear power generation, by lay juries and courts unschooled in the complexities of radiation safety, contradicts Congress' direction that there be uniformity in the regulation of nuclear power pursuant to a program designed to encourage the development of nuclear power consistent with public health and safety, as determined by those with the expertise necessary to protect public health and safety. The court of appeals'

decision thus contradicts the decisions of this Court that "the Federal Government has occupied the entire field of nuclear safety concerns." *Pacific Gas & Elec. Co.*, 461 U.S. at 212; *see also English v. General Electric Co.*, 496 U.S. 72, 82 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249 (1984).

Although this conflict is troubling in its own right and warrants this Court's intervention, the widespread impact the court of appeals opinion will have presents additional reason for concern. The "TMI litigation" currently comprises over 2000 personal injury cases as well as a smaller number of business interruption and property damage claims. Ten "test cases," involving claims for leukemia and various other cancers, have been selected for trial. Given the prevalence of cancer in our society, there are likely to be more such cases in the TMI litigation. In addition, elsewhere in the nation there are currently pending similar cases brought by members of the nuclear workforce or the general public residing around nuclear power plants, federal and private fuel fabrication facilities, and weapons production plants, in which claims of radiation injury have been asserted.[4] These cases collectively involve thousands more plaintiffs.

The decision by the court of appeals is one of first impression under the Price-Anderson Act, and will affect not only the way in which the "test cases" are tried in this litigation, but also how all other public liability actions arising out of radiation exposure will proceed. It is important that there be uniformity and consistency between the federal regulatory scheme governing the use of nuclear power, and public liability actions arising from such use. It is especially important, then, that this landmark case be reviewed by this Court, so that all public liability actions proceed in accordance with the

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4. *See, e.g., In the Matter of West Chicago Thorium Tailings*, Nos. 95 C 2110 and 93 C 3623 (N.D. Ill.); *Kennedy v. Southern California Edison Company*, No. 95-3769 (S.D. Cal. filed on November 17, 1995); *Hall v. Babcock & Wilcox Co.*, No. 94-0951 (W.D. Pa. filed June 6, 1994); *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378 (D. Colo. 1993); *In re Hanford Nuclear Reservation Litig.*, 780 F. Supp. 1551 (E.D. Wash. 1991).

correct standard, namely, the standard established by the federal agency having the exclusive authority and the requisite expertise.

I. THE NUCLEAR REGULATORY COMMISSION HAS DETERMINED THAT CERTAIN EXPOSURES RESULTING FROM THE OPERATION OF NUCLEAR POWER FACILITIES ARE PERMISSIBLE

In 1954, Congress determined that it was in the public interest to develop a domestic nuclear power industry and adopted the Atomic Energy Act of that year. That legislation enabled private industry to participate in the development of commercial nuclear facilities. Hand in hand with Congress' decision to encourage private sector involvement was its determination to assure the safety of the public by providing for extensive federal regulation of the nuclear industry. *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1096-97 (7th Cir.), *cert. denied*, 114 S. Ct. 2711 (1994).

In the 1959 Cooperation with States Amendments to the Atomic Energy Act, Congress established the Federal Radiation Council ("FRC"), whose function was to:

> advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with States.

Atomic Energy Act of 1954, Cooperation with States Amendment, Pub. L. No. 86-373, § 274(h), 73 Stat. 777, 779.[5] In accordance with this statutory mandate, the FRC recommended

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5. To ensure that this function was performed in accordance with the highest level of expertise, Congress directed the FRC to:

> consult qualified scientists and experts in radiation matters, including the President of the National Academy of Sciences, the Chairman of the National Committee on Radiation Protection and Measurement, and qualified experts in the field of biology and medicine and in the field of health physics.

Id.

and the NRC promulgated limits on the levels of permissible exposure to radiation and radioactive effluent as a result of federally licensed activities. [6]

As its starting point, the FRC used normal exposures to naturally occurring radiation as a guide in the establishment of radiation protection standards for the general population. FRC Staff Report, *Background Material for the Development of Radiation Protection Standards* § 5.2 at 26 (1960) ("FRC Report No. 1"). The theory was that the human race had been exposed to background radiation throughout its history, and the differences in amounts of background radiation had not been sufficiently great to lead to attempts to control background radiation, or to serve as a basis for selecting one's environment. *Id.* at 26. On that basis, the FRC recommended that the yearly radiation exposure to individuals in the general population (exclusive of exposures to natural background radiation and medical exposures) should not exceed 500 millirems. [7]

President Kennedy approved the recommendations of the FRC, and caused them to be published as guidance for all federal agencies. 25 Fed. Reg. 4402, 4403 (1960). Those values were then incorporated in amendments to AEC regulations published in September, 1960. *See* 25 Fed. Reg. 8595 (1960).

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6. Because the generation of nuclear power involves the routine release of some amounts of radioactive material in the course of normal operation, the regulations were constructed in terms of maximum *permissible* exposures. *See* 10 C.F.R. §§ 20.101-20.108 (1979) (titled "Permissible Doses, Levels, and Concentrations").

7. The FRC noted the essential agreement between its standard and the recommendations of the National Committee on Radiation Protection and Measurements ("NCRP"). *Id.* The NCRP had recommended limits on permissible radiation exposures by determining the permissible levels for nuclear workers at a level which "the average person would [not] regard as being objectionable and/or competent medical authorities would [not] regard as being deleterious to the health and well being of the individual" at "any time during his lifetime," *Johnston v. United States*, 597 F. Supp. 374, 424-25 (D. Kan. 1984) (*quoting* NCRP Handbook 59, *Permissible Dose from External Sources of Ionizing Radiation* at 21 (Sept. 1954)), and setting permissible exposures offsite which were *ten times below* that level.

With some minor amendments, these were the regulations in place as of the 1979 accident at TMI. The regulations governing permissible exposures to nuclear workers and the general public were published at 10 C.F.R. §§ 20.101, *et seq.* The permissible limits for members of the general public were contained in 10 C.F.R. §§ 20.105 and 20.106. Section 20.105, App. at 68a, regulated the levels of radiation permitted to emanate offsite to unrestricted areas from onsite activities. Section 20.106, App. at 68a, regulated the concentrations of radioactivity permitted in effluent, air or water, released to offsite areas.

These regulatory limits on permissible *releases* were intended to keep *exposures* to any individual offsite below 500 millirems:

> Current practice emphasizes that the individual receiving the maximum dose should not be exposed to more than 0.5 rem [500 millirems] per year. This is clearly specified by the regulations of the Atomic Energy Commission (AEC) which requires that its licensees should operate so that *no person outside the controlled area* is exposed to more than 0.5 rem [500 millirems] per year.

NCRP Report No. 43, *Review of the Current State of Radiation Protection Philosophy* 18 (1975) (citing 10 C.F.R. Part 20) (emphasis added). The 500 millirems limit was well below the level at which any harm could be expected to occur:

> The Commission's radiation protection standards, which are based on recommendations of the Federal Radiation Council (FRC) as approved by the President, are contained in 10 C.F.R. Part 20, "Standards for Protection Against Radiation . . . ." As in the case of parallel recommendations of the National Council on Radiation Protection and Measurements (NCRP) and the International Commission on Radiological Protection (ICRP), these FRC standards which have been previously adopted [§ 20.105, § 20.106] give appropriate consideration to the overall requirements of health protection and the beneficial use of Atomic Energy. The Commission believes that

> the record clearly indicates that any biological effects that might occur at the low levels of these standards have such low probability of occurrence that they would escape detection by present-day methods of observation and measurement.

40 Fed. Reg. 19,439-40 (1975).

II. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE FEDERAL REGULATIONS AND TO SETTLED PRINCIPLES OF TORT LAW

The regulations themselves, which allow higher emissions or releases from a plant than those contained in §§ 20.105 and 20.106 so long as no member of the public is exposed to more than 500 millirems, confirm that the regulatory concern was *exposures* of 500 millirems to the individual. *See* 10 C.F.R. § 20.105(a) ("The Commission *will approve* the proposed limits if the applicant demonstrates that the proposed limits are not likely to cause *any individual to receive a dose* to the whole body . . . in excess of 0.5 rem [500 millirems].") (emphasis added); 10 C.F.R. § 20.106(b) ("The Commission *will approve* the proposed limits if the applicant demonstrates: . . . (2) That it is not likely that radioactive material discharged in the effluent *would result in the exposure of an individual* to concentrations of radioactive material in air or water exceeding the limits specified in Appendix 'B,' Table II of this part.") (emphasis added). In the absence of a demonstration that no real person would receive more than a 500 millirems exposure, the licensee is limited to releases of not more than 500 millirems at the site boundary, the closest point at which someone hypothetically might be exposed. *See* 10 C.F.R. § 20.105(b) (referencing an "individual continuously present in the area").

The regulatory history further confirms that the regulations were intended to protect individual members of the public from exposures in excess of the permissible level. The introduction of the AEC's very first regulations explained that the predecessors of §§ 20.105 and 20.106 were to provide "a very substantial margin of safety for exposed *individuals*" and that they were "designed to assure that *individuals* in 'unre-

stricted areas' do not receive exposure" in excess of the permissible limits. 22 Fed. Reg. 548, 549 (1957) (emphasis added).

In September, 1960, new AEC regulations were published which included a revision to the values specified in Appendix B to 10 C.F.R. § 20.106, governing concentrations of radioactivity in effluent. 25 Fed. Reg. 8595 (1960). Those levels were calculated to assure that no hypothetical maximally exposed *individual* would receive a dose greater than 500 millirems per year. *Id.* at 8596.

The intent to limit individual offsite exposures to not more than 500 millirems remained in 1961, when the FRC confirmed that "the whole body RPG[8] for the general population of 0.5 rem [500 millirems] per year *applies to individual members* of the general population." Staff Report of the Federal Radiation Council No. 2, *Background Material for the Development of Radiation Protection Standards* § 1.3 at 1 (Sept. 1961) (emphasis added).

Throughout the regulatory history, the intent to protect individuals from exposures over 500 millirems has been confirmed. *See, e.g.*, NCRP Report No. 43, *Review of the Current State of Radiation Protection Philosophy* (1975) at 18 (citing 10 C.F.R. Part 20) ("Current practice emphasizes that *the individual* receiving the maximum dose should not be exposed to more than 0.5 rem [500 millirems] per year . . . licensees should operate so that *no person* outside the controlled area is exposed to more than 0.5 rem [500 millirems] per year.") (emphasis added).

Thus, the purpose of the permissible dose regulations was to protect real people from actual exposures above the federal permissible dose limits. The court of appeals' decision, however, did not consider the purpose or intent of the regulations regarding resultant *exposures*, in its determination that in the context of a public liability action, a violation of the limit on *releases* constitutes a breach of duty. Instead, the court, contrary to the purpose and intent of the regulations, applied the limits on releases as the standard of care in tort: if the regula-

8. Radiation Protection Guide.

tion was exceeded *anywhere*, then the duty owed *everywhere* — even where exposures were substantially below the permissible limits — was breached.

Petitioners do not disagree with the court of appeals that the NRC may assess a regulatory violation if concentrations of radioactive material at the point of release exceed the regulatory limits. Indeed, § 20.106 explicitly so states. Similarly, petitioners do not disagree that the NRC may assess a regulatory violation of § 20.105 if levels of radiation "in any unrestricted area" exceed the permissible limits. But operation of the regulations for regulatory purposes does not answer the question presented here.

The question in public liability actions is how the federal permissible limits on radioactive releases should operate in assessing violation of the duty owed to tort plaintiffs claiming injuries as a result of a radioactive release. The court of appeals adopted, as the measure of that duty, the language of §§ 20.105 and 20.106 regarding releases, without considering the regulatory language or history confirming that the whole point of the regulations is to control exposures which real individuals may receive. The fact that as a regulatory matter, § 20.106 instructs that radioactive *releases* be measured at the boundary of the restricted area does not mean that the same point of measurement is appropriate for assessing whether the duty owed a particular tort plaintiff has been violated.

The court of appeals relied on Restatement (Second) of Torts § 286 for the proposition that an administrative regulation establishes the standard of care (or duty) by the licensee, 67 F.3d at 1113 n.24, App. at 19a n.24, a proposition with which defendants agree. However, § 286 of the Restatement contradicts the court of appeals' method of applying the regulatory standard in a tort suit. The comments to subsections (c) and (d) of the Restatement affirm the necessity of determining the particular hazard to which the legislative or regulatory purpose was directed. The regulatory history is unambiguous as to the radiation "hazard" from which it sought to protect a member of the public — actual offsite *exposure* in excess of 500 millirems. Accordingly, the court of appeals' determination, that a release resulting in offsite exposures less than 500

millirems violates the duty of care owed in tort, was faithful neither to the traditional tort principles embedded in Restatement (Second) of Torts § 286 nor to the regulations the court construed.

Requiring a public liability action plaintiff to show that the regulatory limit was exceeded *as to him or her* brings the duty of care inquiry in public liability actions in accord with the traditional tort principle that a duty of care is owed to actual plaintiffs. For example, a driver would not be deemed in violation of his duty of care to a pedestrian because he had run a red light several intersections back, or because he had been speeding at an earlier point in his travels. A traffic law may have been violated at those earlier points, but if the tort suit involves a pedestrian subsequently struck by the driver's vehicle, whether the driver violated any duty owed the pedestrian is universally assessed at the point where the collision occurred.

As explained by Prosser, the concept of an "absolute wrong" was eliminated long ago in the law of negligence, when "the courts developed the idea of duty, as a matter of some specific relation between the plaintiff and the defendant without which there could be no liability." Keeton, W. Page, et al., *Prosser and Keeton on the Law of Torts* § 53 at 357 (5th ed. 1984). The rule developed that "no action could be founded upon the breach of a duty owed only to some person other than the plaintiff. He must bring himself within the scope of a definite legal obligation, so that it might be regarded as personal to him." *Id.*

By collapsing the issue of exposure into the sole issue of proximate cause, the court of appeals imposes a unique burden on the nuclear industry. In virtually every other tort context, a plaintiff must show that he or she, personally, was in the class of persons placed at unreasonable risk. *See, e.g.*, Restatement (Second) of Torts § 286, *supra*. The federal regulations at issue here define that class of persons — those persons outside the controlled area exposed to more than 500 millirems of radiation per year.[9] The holding of the court of appeals would

9. It bears noting that even that class of persons, those persons exposed

permit recovery by persons not within the class defined by the regulations — persons exposed to less than 500 millirems per year — so long as there might have been some hypothetical person who hypothetically might have been exposed above that level. In short, the court of appeals has determined that in the context of the nuclear industry there exists an "absolute wrong," a concept rejected in American law, upon which a plaintiff may predicate liability.

The purpose of the Price-Anderson Act is not to disadvantage the nuclear industry. Nor, except in the context of an extraordinary nuclear occurrence, 42 U.S.C. § 2210(n), is it intended to create this kind of substantive advantage for persons claiming injury as a result of the nuclear hazard.[10] The Act expressly directs that state law is to provide the rules of decision in public liability actions, unless that law is inconsistent with the Act. 42 U.S.C. § 2014(hh). The state rules of decision here, Pennsylvania's, comport with the traditional precepts of tort law and require that the regulatory violation for tort purposes be measured at the point of impact on plaintiff. *See Heck v. Beryllium Corp.*, 226 A.2d 87, 90 (Pa. 1966) (Atomic Energy Commission's standards for beryllium in offsite areas constituted standard of care which, if exceeded "toward any person within the area of exposure," would constitute negligence); *Dahlstrom v. Shrum*, 84 A.2d 289 (Pa. 1951) (scope of duty limited to foreseeable risk of harm to plaintiff resulting from defendant's conduct). *See generally Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 99-100 (N.Y. 1928) ("Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. Proof of

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to more than 500 millirems, is not necessarily at risk of foreseeable injury. The 500 millirems permissible dose limit is ten times below the permissible dose for nuclear workers, which was set at a level not expected to result in foreseeable injury. *See* note 7, *supra*.

10. The NRC has determined that the TMI accident was not an "extraordinary nuclear occurrence," 42 U.S.C. § 2210(n). *See* 45 Fed. Reg. 27,590 (1980) ("The Commission today determines that the accident at Three Mile Island did not constitute an 'extraordinary nuclear occurrence' (ENO) as that term is defined by the Price-Anderson Act and the Commission's regulations").

negligence in the air, so to speak, will not do . . . . What the plaintiff must show is 'a wrong' to herself; *i.e.*, a violation of her own right, and not merely a wrong to someone else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to anyone."). The Third Circuit failed to address either these traditional tort principles or the specific state rules of decision which should have guided its determination.

III. THE COURT OF APPEALS' DECISION SHOULD BE REVERSED AS CONTRARY TO THIS COURT'S DECISIONS

In *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. at 212, this Court held that "the Federal Government has occupied the entire field of nuclear safety concerns."

> [F]rom the passage of the Atomic Energy Act in 1954, through several revisions, and to the present day, Congress has preserved the dual regulation of nuclear-powered electricity generation: the Federal Government maintains complete control of the safety and "nuclear" aspects of energy generation; the States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like.

Id. at 211-12 (footnote omitted).

Federal preemption of the safety aspects of nuclear power was reaffirmed by this Court in *Silkwood*, 464 U.S. at 240-41 (1984) ("States are precluded from regulating the safety aspects of nuclear energy"), and again in *English v. General Electric Co.*, 496 U.S. 72, 82 (1990) ("Congress intended that only 'the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant.'") (*quoting Pacific Gas & Electric*, 461 U.S. at 205). Indeed, the Court of Appeals for the Third Circuit itself has emphasized:

> State safety regulation is not pre-empted only when it conflicts with federal law. Rather, *the Federal Government*

> *has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States. When the Federal Government completely occupies a given field . . . as it has done here, the test of pre-emption is whether the "matter on which the State asserts the right to act is in any way regulated by the Federal Act."*

In re TMI Litig. Cases Consol. II, 940 F.2d 832, 858 (3d Cir.) (quoting *Pacific Gas & Elec.*, 461 U.S. at 212-13) (emphasis in original), *cert. denied*, 503 U.S. 906 (1992).

Traditional tort principles limit the duty of care to those risks which are reasonably foreseeable. In public liability actions, the amount of exposure which could foreseeably place persons at an unreasonable risk is not specified by the Price-Anderson Act itself. Instead, the NRC, the federal agency having exclusive authority over the radiological hazard, was given the authority to make the determination that exposures below 500 millirems do not result in a foreseeable or unreasonable risk to individual members of the public.

Despite the court of appeals' explicit recognition of the federal preemption of nuclear safety issues, it held that exposures resulting from releases of radioactive material from a nuclear power plant, at levels the NRC has determined will not result in adverse health consequences, are actionable in public liability litigation.

The court of appeals' *substitution of its lay opinion regarding the nuclear safety hazard* for that of the agency with exclusive regulatory authority is evident in the court's discussion of the foreseeability of the risk of harm from radiation exposure. The court states that there may be some individuals who were so distant from a licensee's facility that a violation of the regulatory limits on releases at the site boundary could not result in a foreseeable risk of harm to them. *In re TMI*, 67 F.3d at 1118 n.34, App. at 27a n.34. However, the court of appeals also states that if there is a release above regulatory limits at the site boundary, a risk of harm is foreseeable as to *any* plaintiff who might be exposed to *any* radiation as a result of that release, no matter how distant and no matter how slight the resulting exposure. *Id.*

This substitution of lay for expert opinion is precisely what the federal preemption of nuclear safety was intended to prevent. According to the court of appeals' construct, if there were a release of 510 millirems from a licensed facility, a person in the pathway of that release but exposed to only 1 millirem (500 times below the permissible limit) is entitled to have a jury assess his or her proof that the 1 millirem exposure caused his or her cancer. But if there were a release of 25 millirems from a licensed facility, a person receiving a 1 millirem exposure would not be entitled to attempt to prove that such exposure caused an identical cancer. The court of appeals' failure to consider the purpose of the regulations, and the substitution of its lay opinion regarding radiation risk, would lead it to the conclusion in the first instance that a 1 millirem exposure is a foreseeable risk, and to the conclusion in the second instance that it is not.

The result is completely illogical, and for that reason alone needs review by this Court. Moreover, the practical impact of the decision upon the "test case" trial in this litigation requires this Court's review as well. The NRC has determined that exposures below 500 millirems will not result in foreseeable harm. Yet the court of appeals' decision will allow lay juries to determine whether such exposure may have caused harm because, in the court's view, such exposures do create a foreseeable risk of harm. Moreover, instructions to the jury premised on the court of appeals' construction of the federal regulations will transmit a greatly exaggerated definition of the risk, inviting a cascade of mistaken judgments by the jury. These mistaken judgments would likely affect how the jury evaluates the credibility of witnesses and evidence on causation, as well as the evidence on the breach of the duty owed.

IV. THERE ARE SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO REVIEW THE DECISION BELOW

Despite its erroneous conclusion, the court of appeals correctly recognized that the determination of whether to impose a duty "is essentially one of policy." *In re TMI*, 67 F.3d at 1117,

App. at 26a (quoting *Hoffman v. Sun Pipe Line Co.*, 575 A.2d 122, 125 (Pa. Super. Ct. 1990)). The concept of "duty" is "not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Id.*, App. at 27a (quoting *Prosser and Keeton on the Law of Torts* § 53 at 358). The question presented here — whether a public liability action is cognizable absent exposures in excess of the regulatory levels — is precisely such a question of policy.

Almost one in two American men, and one in three American women living today can be predicted to develop cancer at some point in their lives; one in five Americans can be predicted to die from cancer. American Cancer Society, *Cancer Facts & Figures* 1, 13 (1995). The Price-Anderson financial protection system was not intended, however, to be the national health program for such persons working at or residing within some radius of a nuclear power plant, if they received any exposure whatsoever from that plant. In order to find the nuclear industry liable for compensating persons with cancer, and to protect that industry from spurious claims, it is sensible and just to require a threshold showing that those persons were exposed to radiation at levels above those permitted by the federal government as appropriate for the protection of public health and safety.

In *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994), this Court considered whether and to what extent recovery for negligent infliction of emotional distress is available under the Federal Employers' Liability Act ("FELA"). This Court examined the purposes and background of the statute and reversed the formulation by the Court of Appeals for the Third Circuit of the scope of an employer's duty and resultant liability for such claims. This Court observed that under the court of appeals' standard, the employer "could face the potential of unpredictable liability to a large number of employees far removed from the scene of the allegedly negligent conduct." *Id.* at 2409. This was an unacceptable result, as it tended to make federal employers "the insurers of the emotional well-being and mental health of their employees,"

under a statute that was never intended to function as such. *Id.* Instead, this Court adopted the common law test restricting the scope of the duty owed for negligent infliction of emotional distress which best furthered Congress' goals in enacting the federal legislation. The same policy considerations underlying the common law restrictions on the scope of the duty owed in such cases, including "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability," *id.* at 2411, compel the restriction of public liability claims to actions based on exposures in excess of the permissible exposure limits.

Focusing public liability litigation initially on the question of the radiation exposures resulting from the nuclear incident at issue is an efficient way to manage public liability litigation. It is entirely consonant with the federal policies giving rise to the Price-Anderson Act, and assures more efficient compensation of persons potentially injured by their exposures. Defendants should not be forced to incur the necessarily large transaction costs in educating juries on the absence of real health risks at dose levels which the expert federal agency has determined, after exhaustive research, will not cause perceptible harm.

Numerous cases have been filed around the country in which it is contended that radioactive material from nuclear facilities has caused personal injury and property damage. *See* n. 4, *supra.* Some see the rise in public liability litigation as the next potential "mass tort" litigation, similar to asbestos. When the only competent evidence is that someone's exposure was within the levels permitted by the federal government, defendants should not be put to the expense of litigating further, or the risk that a sympathetic or angry lay jury will not tolerate any level of radiation exposure.

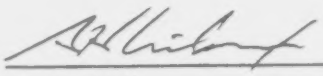
Nuclear power has become a subject charged with emotional content, and therefore a subject of heated debate. But in a court of law, the Atomic Energy Act has set the policy: nuclear power is to be encouraged, with safety controlled by the designated federal agency. That agency has acted and established permissible levels of exposure, permissible pre-

cisely because they present no perceptible threat to public health and safety. It can only be concluded, contrary to the court of appeals' decision, that no legal right of any citizen has been violated, no duty owed that citizen has been breached, by exposures below those permissible levels.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



A. H. Wilcox
Counsel of Record
Ellen Kittredge Scott
Pepper, Hamilton & Scheetz
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 981-4000

Attorneys for Petitioners